From: LERS, EOIR (EOIR)
To: LERS, EOIR (EOIR); All of Judges (EOIR); BIA BOARD MEMBERS (EOIR); BIA ATTORNEYS (EOIR); All of OCIJ JLC (EOIR); Alder Reid, Lauren (EOIR); Allen, Patricia M. (EOIR); Baptista, Christina (EOIR); Barnes, Jennifer (EOIR); Bauder, Melissa (EOIR); Berkeley, Nathan (EOIR); BIA TEAM JLC; BIA TEAM P (EOIR); Brazill, Caitlin (EOIR); Burgie, Brea (EOIR); Burgus, Elizabeth (EOIR); Cicchini, Daniel (EOIR); Cowles, Jon (EOIR); Curry, Michelle (EOIR); Evans, Brianna (EOIR); Grodin, Edward (EOIR); Hartman, Alexander (EOIR); Kaplan, Matthew (EOIR); King, Jean (EOIR); Korniluk, Artur (EOIR); Lang, Steven (EOIR); Lovejoy, Erin (EOIR); Martinez, Casey L. (EOIR); Noferi, Mark (EOIR); Park, Jeannie (EOIR); Powell, Karen B. (EOIR); Ramirez, Sergio (EOIR); Rimmer, Phillip (EOIR); Robbins, Laura (EOIR); Rodrigues, Paul A. (EOIR); Rodriguez, Bernardo (EOIR); Rothwarf, Marta (EOIR); Sanders, John W. (EOIR); Schaaf, Joseph R. (EOIR); Stutman, Robin M. (EOIR); Swanwick, Daniel (EOIR); Taufa, Elizabeth (EOIR); Vayo, Elizabeth (EOIR); Wilson, Amelia (EOIR)
Cc: McHenry, James (EOIR); Reilly, Katherine (EOIR); Santoro, Christopher A (EOIR); Sheehey, Kate (EOIR); Moutinho, Deborah (EOIR); Adams, Amanda (EOIR); Pease, Jeffrey (EOIR); Morgan, Kenosha (EOIR); Macri, Andrea (EOIR); EOIR Library (EOIR)
Subject: Policy & Case Law Bulletin - May 18, 2018
Date: Friday, May 18, 2018 3:23:17 PM

EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
Office of Policy | Legal Education and Research Services Division

Policy & Case Law Bulletin
May 18, 2018

Federal Agencies

DOJ

- Attorney General Issues Decision in Matter of Castro-Tum

  27 I&N Dec. 271 (A.G. 2018)

  (1) Immigration judges and the Board do not have the general authority to suspend indefinitely immigration proceedings by administrative closure. To the extent the Board's decisions in Matter of Avetisyan, 25 I&N Dec. 688 (BIA 2012), and Matter of W-Y-U-, 27 I&N Dec. 17 (BIA 2017), are inconsistent with this conclusion, those decisions are overruled. (2) Immigration judges and the Board may only administratively close a case where a previous regulation or a previous judicially approved settlement expressly authorizes such an action. (3) Neither 8 C.F.R. § 1003.10(b) nor 8 C.F.R. § 1003.1(d)(1)(ii) confers the authority to grant administrative closure. Grants of general authority to take measures "appropriate and necessary for the disposition of . . . cases" would not ordinarily include the authority to suspend cases indefinitely. Additionally, 8 C.F.R. § 1240.1(a)(1), which authorizes immigration judges to take actions that "may be appropriate" in removal proceedings, and 8 C.F.R. § 1240.1(c), which empowers immigration judges to "otherwise regulate the course of the hearing," do not entail an authority to grant indefinite suspensions. Finally, regulations empowering the Chief Immigration Judge and the Chairman of the Board to manage dockets—8 C.F.R. § 1003.9(b)(1) and 8 C.F.R. § 1003.1(a)(2)(i)(A)—grant no express authority to administratively close cases, and cannot reasonably be interpreted to implicitly delegate such authority. (4) Under the Immigration and Nationality Act, the Department of Homeland Security has the exclusive authority to decide whether and when to initiate proceedings. Once the Department of Homeland Security initiates proceedings, immigration judges and the Board must proceed "expeditious[ly]" to resolve the case. 8 C.F.R. § 1003.12. (5) For cases that truly warrant a brief pause, the regulations expressly provide for continuances. 8 C.F.R. § 1003.29. (6) The Immigration and Nationality Act unambiguously states that, with respect to in absentia proceedings, so long as the Department of Homeland Security adequately alleges that it provided legally sufficient written notice to an alien, the alien "shall be ordered removed in absentia if [the Department of Homeland Security] establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the

alien is removable." INA § 240(b)(5)(A), 8 U.S.C. § 1229a(b)(5)(A). The Immigration and Nationality Act thus imposes an obligation to proceed expeditiously to determine whether the requisite evidence supports the removal charge. (7) Where a case has been administratively closed without the requisite authority, the immigration judge or the Board, as appropriate, shall recalendar the case on the motion of either party.

- Virtual Law Library Weekly Update — EOIR

  This update includes resources recently added to EOIR's internal or external Virtual Law Library, such as Federal Register Notices, country conditions information, and links to recently-updated immigration law publications.

DHS

- USCIS Announces Policy Manual Updates

  On May 15, 2018, USCIS announced updates to its policy manual related to immigrant investor (EB-5) cases involving tenant occupancy and adjustment of status interview guidelines and interview waivers.

- USCIS and DOJ Formalize Partnership to Protect U.S. Workers from Discrimination and Combat Fraud

  On May 11, 2018, USCIS and DOJ announced a Memorandum of Understanding "that expands their collaboration to better detect and eliminate fraud, abuse, and discrimination by employers bringing foreign visa workers to the United States. This new effort improves the way the agencies share information, collaborate on cases, and train each other's investigators."

- USCIS Issues Policy Memorandum on Accrual of Unlawful Presence and F, J, M Nonimmigrants

  On May 10, 2018, USCIS issued a policy memorandum (effective August 9, 2018) that provides guidance "to officers and assists USCIS officers in the calculation of unlawful presence of those in student (F nonimmigrant), exchange visitor (J nonimmigrant), or vocational student (M nonimmigrant) status and their dependents while in the United States."

DOS

- DOS Issues Final Rule on Passports, CRBAs, and Hearings

  On May 11, 2018, a final rule was published that provides various changes and updates to the Department of State passport rules. "The final rule incorporates statutory passport denial and revocation requirements for certain convicted sex offenders. It notes that, notwithstanding the legal bases for denial or revocation of a passport, the Department may issue a passport for direct return to the United States. It sets out the Department's procedures for denying and cancelling Consular Reports of Birth Abroad. Finally, the final rule provides additional information relating to the conduct of review hearings."

- DOS Posts June 2018 Visa Bulletin

  The Visa Bulletin includes a summary of available immigrant numbers, visa availability, and scheduled expiration of visa categories.

Supreme Court

CERT. GRANTED

- The Supreme Court granted certiorari, vacated the judgments, and remanded in multiple cases for further consideration in light of Sessions v. Dimaya, 138 S. Ct. 1204 (2018).

CERT. DENIED

Each of the following cases in which certiorari was denied presented the question of whether 18 U.S.C. § 16(b), as incorporated into the INA's provisions governing an alien's removal from the United States, is unconstitutionally vague, which was resolved in

Sessions v. Dimaya, 138 S. Ct. 1204 (2018).

- Sessions v. Magana-Pena

  No. 15-1494, 2018 U.S. LEXIS 2996 (May 14, 2018)

- Sessions v. Lopez-Islava

  No. 15-1496, 2018 U.S. LEXIS 3077 (May 14, 2018)

- Sessions v. Miranda-Godinez

  No. 16-398, 2018 U.S. LEXIS 2954 (May 14, 2018)

- Sessions v. Golicov

  No. 16-966, 2018 U.S. LEXIS 3023 (May 14, 2018)

- Sessions v. Baptiste

  No. 16-978, 2018 U.S. LEXIS 3056 (May 14, 2018)

Third Circuit

- Concha v. Duke

  No. CV 17-5321, 2018 WL 2216119 (E.D. Pa. May 15, 2018) (unpublished) (VAWA)

  The alien, a VAWA self-petitioner, challenged USCIS's denial of his petition. The district court dismissed the alien's complaint in part for lack of subject matter jurisdiction, but where the court exercised jurisdiction, it concluded that the USCIS's interpretation of "extreme cruelty" under 8 C.F.R. § 204.2(c)(1)(vi) was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." In rejecting the alien's arguments, the court concluded that marital infidelity and lies are not expressly covered by the regulation and are not similar to the types of conduct enumerated in the regulation. Moreover, the court determined that the regulation does not require the USCIS to categorize acts as "extreme cruelty" simply because they may cause mental injury such as depression.

Fifth Circuit

- Hernandez-Rivera v. Sessions

  No. 17-60359, 2018 WL 2144042 (5th Cir. May 9, 2018) (unpublished) (Asylum-PSG)

  The Fifth Circuit denied the PFR, upholding the Board's determination that the alien did not establish past persecution or a well-founded fear of future persecution in El Salvador on account of a protected ground, to wit as a former police officer or based on family membership. The court also denied CAT protection because the alien had not shown government officials would acquiesce or consent to his torture by gang members.

Sixth Circuit

- Gomez v. Sessions

  No. 17-3946, 2018 WL 2110891 (6th Cir. May 8, 2018) (unpublished) (Cancellation; Asylum-PSG)

  The Sixth Circuit denied the PFR, affirming the Board's finding that the alien was ineligible for cancellation of removal where he did not establish continuous physical presence based on his testimony alone and no corroborating evidence. The court also upheld the Board's conclusion that the alien was not entitled to withholding of removal on account of

membership in a particular social group. Relying on Sanchez-Robles v. Lynch, 808 F.3d 688, 692 (6th Cir. 2015), the court rejected the argument that "individuals who are likely victims of being kidnapped due to time spent in the United States" because of their perceived wealth are a cognizable particular social group under the Act.

Eighth Circuit

- Garcia-Urbana v. Sessions

  No. 16-1571, 2018 WL 2206541 (8th Cir. May 17, 2018) (Aggravated Felony)

  The Eighth Circuit denied the PFR, upholding the Board's determination that Minn. Stat. § 609.344, subdiv. 1(b) (criminal sexual conduct) qualifies as a sexual abuse of a minor aggravated felony because it involves a minor victim (between the ages of 13 and 15 years old) and requires sexual abuse (penetration).

- Ahmed v. Sessions

  No. 17-2035, 2018 WL 2209433 (8th Cir. May 15, 2018) (Aggravated Felony)

  The Eighth Circuit denied the PFR, holding that the Board correctly affirmed the IJ's conclusion that the alien's conviction under N.D. Cent. Code § 12.1-22-04(1)(b), (2) (unlawful entry into a vehicle) was a substantial step toward committing an aggravated felony attempted theft in violation of 101(a)(43)(G) and (U) of the INA. Relying on the amended information and the alien's guilty plea, the court concluded that the alien completed a substantial step toward accomplishing his criminal intent to deprive an owner of rights and benefits to property.

Ninth Circuit

- Sicat v. Sessions

  No. 16-73690, 2018 WL 2146053 (9th Cir. May 10, 2018) (unpublished) (In absentia)

  The Ninth Circuit granted the PFR and remanded for the agency to resolve whether the alien received notice of his March 2016 removal hearing and whether he is entitled to rescission of his in absentia order of removal. In determining that the alien did not rebut the presumption of delivery, the IJ gave significant weight to the alien's provisional ineligibility for relief, his absence at one visa interview, and the absence of any returned mail in the record, while according limited weight to the family's sworn affidavits asserting that they did not receive notice and the alien's attendance at ten previous immigration court hearings. The court determined that the IJ improperly weighed the evidence and concluded that the sworn affidavits sufficiently overcame the presumption of delivery. The dissent asserted that the majority incorrectly exercised de novo review rather than abuse of discretion review. The dissent argued that under the correct standard of review, a remand is not necessary because the IJ properly applied the factors set forth in Matter of M-R-A-, 24 I&N Dec. 665 (BIA 2008), and weighed the evidence in a way that was not arbitrary, irrational, or contrary to law.